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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES NAAUAO KAHOLOKULA, JR.,

Defendant and Appellant.

F044923

(Super. Ct. No. 1054930)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Stanislaus County. Loretta Murphy Begen, Judge.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Charles A. French and Brook A. Bennigson, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Harris, Acting P.J., Buckley, J., and Wiseman, J.

Appellant, James Naauao Kaholokula, Jr., was charged in an information with felony drunk driving (Veh. Code, §§ 23152, subd. (a), 23550, subd. (a)) (count I) and driving with a blood alcohol level of .08 percent or higher, a felony (Veh. Code, §§ 23152, subd. (b), 23550, subd. (b)) (count II).[1] The information alleged appellant had 15 prior serious felony convictions within the meaning of the three strikes law. The jury acquitted appellant of count II and convicted him of count I. In a bifurcated proceeding, the trial court found true the allegations appellant had 15 prior serious felony convictions.

The trial court sentenced appellant to prison for a term of 25 years to life, imposed a restitution fine, and granted applicable custody credits. On appeal, appellant contends there was insufficient evidence to support his conviction on count I because the jury acquitted him of count II, the allegation he had a blood alcohol level of .08 percent or higher.

FACTS

Shortly after midnight on February 16, 2003, Modesto Police Sergeant Robert Stewart was typing a response to another officer from the computer of his unmarked patrol car. Stewart was in the parking lot of Children's Park. A vehicle driven by appellant pulled into the parking lot shortly after Stewart arrived. Appellant exited his vehicle and walked 50 yards into the park and stood underneath a light in front of the bathroom.

Stewart called in appellant's license plate information to the dispatcher. Appellant was in the park about two minutes before returning to his car. Stewart was watching appellant the entire time. Stewart never saw appellant with a bottle in his hand.

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[1] Appellant also was charged with false representation of identity (Pen. Code, § 148.9, count III) and driving with a suspended driver's license (Veh. Code, § 14601.2, subd. (a), count IV). Appellant pled guilty to these allegations at the beginning of his trial.

When Stewart approached appellant, he noticed appellant had watery, bloodshot eyes. Appellant was staggering and unsteady on his feet. His speech was slurred and he smelled of alcohol. Stewart asked appellant if he had been drinking. Appellant replied he had not. When Stewart asked appellant for his identification, appellant said he had none with him but that his identification was at his mother's home. Stewart asked appellant where his mother lived but appellant could not remember. Appellant told Stewart his name was Seamus McKenzie.

Stewart had been a police officer for 11 years and had arrested 500 or more people for being drunk in public and had made 25 or more drunk driving arrests. Based on his observations, Stewart formed the opinion appellant had been driving under the influence of alcohol. Stewart turned the investigation over to Officer Brian Findlen, who was assigned to investigate drunk driving cases that evening.

Findlen had extensive training and experience investigating drunk driving cases. Findlen had received training in drunk driving investigations, taught courses for the Modesto Police Department, and had completed a course in drug recognition. Findlen had made between 150 and 200 driving under the influence arrests during his career and had been involved in 500 such investigations.

Findlen could smell alcohol on appellant's breath and person. Appellant's eyes were bloodshot and watery. Appellant swayed in a rotational manner as Findlen talked to him. Appellant refused to do any of the field sobriety tests. Findlen placed appellant under arrest and told him he was required to take a chemical test to determine his blood alcohol level. Appellant responded, "I'm not giving you anything." Findlen again told appellant he was required to take a chemical test and that it was department policy to do a blood draw if appellant refused. Appellant told Findlen he did not know what Findlen was talking about.

Findlen and Stewart transported appellant to the hospital to perform a forced blood draw. Appellant physically resisted the draw, screaming that he was not going to allow

his blood to be taken. The officers held appellant down while the nurse drew blood. After the blood draw, appellant said he physically resisted to put on a show and became cooperative thereafter.

Duane Lovaas was the criminalist with the Department of Justice who tested appellant's blood. Lovaas determined that appellant's blood alcohol level was .17 percent.[2] Lovaas had testified 1,000 times concerning the effect of alcohol on people. He had conducted experiments on over 100 people involving the effects of drinking alcohol on driving a vehicle. Lovaas had read numerous articles concerning effects of alcohol on driving.

One sign of impairment at higher levels of alcohol consumption is slurred speech. People with blood alcohol levels of .08 percent or higher are not safe drivers. When asked a hypothetical question based generally on the facts of the instant action, Lovaas was of the opinion that a person acting like appellant with a blood alcohol level of .17 percent would be impaired by alcohol and could not safely drive a vehicle.

Lovaas explained that a person with a blood alcohol level of between .17 and .20 percent could still be able to park a car at a curb without showing obvious signs of a problem. Lovaas explained that intoxicated drivers will try to compensate by driving very fast or too slowly, but the total driving experience at a high level of intoxication becomes unsafe.

Appellant's sister, Yollanda Guevara, testified that appellant came over to her home at 11:00 p.m. to fix her children's computer. Appellant worked on the computer just over half an hour and left at 11:40 p.m. During that time he did not drink any alcoholic beverage, he did not smell of alcohol, and he showed no signs of intoxication.

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[2] Criminalist Richard Lynd, who was unavailable for trial, originally tested appellant's blood. Lynd calculated appellant's blood alcohol level at .18 percent. Lovaas explained that the difference between the two results was likely due to the fact that alcohol evaporates from the sample over time.

DISCUSSION

Appellant contends that his conviction for felony drunk driving must be reversed for insufficiency of the evidence because the jury acquitted him of count II, driving with a blood alcohol level at or above .08 percent. Appellant argues that no prosecution witness testified as to the correlation between the symptoms observed by the officers and the impairment, if any, to appellant's driving because appellant drove his car without incident and parked it at the curb. We reject this argument and will affirm the judgment.

Our role in reviewing the sufficiency of evidence on appeal is a limited one. The test is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier reasonably could deduce from the evidence. Although we must ensure the evidence is reasonable, credible, and of solid value, it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. If the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

A person is under the influence of drugs or alcohol within the meaning of the statutes when, as a result of drug or alcohol use, his or her physical and mental abilities are impaired to such a degree that he or she is no longer able to drive a vehicle with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances. (Veh. Code, § 23152, subd. (a); *People v. Bui* (2001) 86 Cal.App.4th 1187, 1194.) Under Vehicle Code section 23152 it is not necessary to prove any specific degree of intoxication. The question whether the accused was under the influence of any intoxicating liquor, or drug, is a question of fact to be determined by the trier of fact from

all the proven circumstances of the case. (*McDonald v. Department of Motor Vehicles* (2000) 77 Cal.App.4th 677, 687; *People v. Weathington* (1991) 231 Cal.App.3d 69, 81.)

Appellant contends that his ability to park the car demonstrates he was not impaired. Though Lovaas testified appellant's blood alcohol level was relatively high, the jury acquitted him in count II of having a high blood alcohol content. Appellant argues we should therefore reject any testimony concerning the level of his blood alcohol content.

Penal Code section 954 provides that an acquittal of one or more counts shall not be deemed an acquittal of any other count. A jury can properly return inconsistent verdicts on separate counts. Inconsistent findings by juries frequently result from leniency, mercy or confusion. Such inconsistencies do not invalidate the jury's findings. (*People v. York* (1992) 11 Cal.App.4th 1506, 1510.) Indeed, evidence from a count rejected by a jury can still be used in a remaining count to determine the sufficiency of the evidence in the remaining count. (See *People v. Consuegra* (1994) 26 Cal.App.4th 1726, 1734, fn. 6.)

Contrary to appellant's assertion, the jury could have rejected count II and still used appellant's high blood alcohol level as a basis to convict him of count I. Appellant's high blood alcohol level was not, however, the only evidence adduced at trial in support of count I. Both officers testified appellant's eyes were bloodshot and watery. Appellant smelled of alcohol on his breath and from his body. His speech was slurred and Findlen saw appellant swaying as he stood and that appellant was unsteady on his feet. Appellant said his identification was at his mother's home but could not remember where she lived. Each of these facts is evidence of appellant's impairment. As noted above, the prosecution need not prove the defendant's degree of intoxication.

Lovaas testified the consumption of alcohol has a direct affect on one's ability to drive a vehicle. Lovaas explained that one sign of impairment at higher levels of alcohol

consumption is slurred speech. Lovaas believed that any driver exhibiting symptoms like appellant's would not be able to operate a motor vehicle safely.

Furthermore, the jury could infer from appellant's evasive behavior of using a false name, refusing to perform a field sobriety test, and resisting the blood draw, that he was showing a consciousness of guilt at the time of his arrest.[3] This is circumstantial evidence supporting appellant's conviction. We conclude there was substantial, credible evidence before the jury from which it reasonably could infer appellant's ability to operate a motor vehicle was impaired as defined by the Vehicle Code.

DISPOSITION

The judgment is affirmed.

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[3] The jury was admonished with CALJIC No. 16.835, a consciousness of guilt instruction.